Wheeler SCRIPT

DEFENSE: We are making a WHEELER MOTION pursuant to People v. Wheeler (1978) 22 Cal.3d 258 and Batson v. Kentucky (1986) 476 U.S 79, because the DDA denied defendant to his right to a fair trial.

JUDGE: Excuses the jury or calls you to sidebar

DEFENSE: This is a clear violation of group (racial) bias. The DDA has now excused three women, who are members of a cognizable class, and this denies my client's right to a fair trial. It is an equal protection violation plain and simple, and what she is doing is forbidden by the law. As you can see, my client is a woman, and it is our position that these kicks are completely gender-related, and unconstitutional.

DDA: **KNOW YOUR LAW AND YOUR THREE-STEP STEP APPROACH**: (Johnson v. California (2005) 545 U.S. 162, 168 and Gutierrez (2017) 2 Cal.5th 1150)

1) **The moving party (defense) must first show that the totality of facts gives rise to an "inference of discriminatory purpose"** (*Johnson* 545 U.S. 162) (meaning that there is a reasonable inference that the person is being kicked because of their group association, rather than because of any specific bias.) (*Johnson, Wheeler*). **This is called the "prima facie case" where movant must "produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson,* at 170)**
    - **If trial court finds there is NO prima facie case, prosecutor <u>should state their neutral justifications for each excusal</u> and the composition of the venire. This is not required, but done as a precaution should the reviewing court disagree with the original finding and determine that the prima facie case *was* shown.**
    - **<u>We suggest stating the reasons for your strikes at the time the Wheeler (Batson) motion is made.</u> The burden of explaining the reasons is minimal, and we typically have good and permissible reasons for our challenges. "Refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." (U.S. v. Collins (9th Cir. 2009) 551 F.3d 914, 928)**

2) **If trial court finds prima facie case, burden shifts to you to explain by offering "clear and reasonably specific" race-neutral justification.**

- **Think about Comparative Analysis**—Why are you keeping one teacher and not the other? "if a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. (*Miller-El v. Dretke*) (2005) 545 U.S. 231). This comparative analysis will and should be considered on appeal. (Gutierrez (2017) 2 Cal.5th 1150)

- **Think about your non-verbal reasons:** "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression, and eye contact." (*People v. Lenix* (2008) 44 Cal.4th 602

3) **Trial court must decide whether purposeful discrimination has been proven by preponderance of evidence standard. (*P v. Mai* (2013) 57 Cal.4th 986)**
   - Burden of Proof = preponderance. (*P v. Hutchins* (2007) 147 Cal.App.4th 992)
   - The presumption is that the challenge is proper. (*P v. Newman* (2009) 176 Cal.App.4th 571)

DDA:

> ***This motion should be denied. The first step in the analysis is that the defense must show that the totality of facts gives rise to an inference of discriminatory purpose. Sometimes called the "prima facie case" The defense has not made a prima facie case, your honor. People v. Neuman (2009) 176 Cal.app.4th 571 states it is their burden to do so. They have to show that the totality of facts gives rise to an "inference of discriminatory purpose." The Defense has simply not met this burden, and several reasons are in support. First, the defense also challenged women, in their first and 3rd challenges. (P v. Wheeler (1978) 22 Cal.3d 258, 283) Additionally, we passed with juror #24, also a woman, our latest excused juror on our panel. (P v. Williams (2013) 56 Cal.4th 630).***

If judge rules NO prima facie case has been established DDA should request permission to lay out neutral justifications:

At this point, I realize the law does not require me to place my gender-neutral justifications on the record, but I would like to do so for protection of the record and any appellate litigation.

If judge rules that a prima facie case HAS BEEN ESTABLISHED, DDA must lay out neutral justifications to overcome the inference of discriminatory purpose:

***As the law requires, I will state a reason for each challenge. (P v. Cervantes (1991) 223 Cal.App.3d 323. Here, your honor, I had several neutral reasons other than gender for Juror #1, the first woman we kicked*:**

- **She was young, single, and had no children. (P v. Perez (1994) 29 Cal.App.4th 1313.**
- **See race-neutral reasons (attached handout)**
- **State reasons for each juror you kicked in the cognizable class. (See Batson/Wheeler Guide Orange County DDA handout**)

JUDGE: (hopefully) Motion denied.

Avoiding Appellate Error

[D.A. Training Material]

Preserving the Record

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Batson Challenges

Claims of racial bias in jury selection fall under:

Batson v. Kentucky (1986) 476 U.S. 79
People v. Wheeler (1978) 22 Cal.3d 258

The way it works is the defense objects to the prosecutor's use of a peremptory challenge, alleging it was racially motivated. The court must determine whether the defense has made a prima facie showing that the peremptory challenge may have been racially motivated. If the court so finds, the burden shifts to the prosecutor to provide a race-neutral basis for exercising the peremptory challenge. The court then must determine whether the defense has proven purposeful racial discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 168.)

If a *Batson* claim is raised, do not respond immediately with your reasons. Let the court first rule whether there has been a prima facie showing of invidious discrimination. If court asks for your response without first finding a prima facie showing, specify that you are responding solely to the lack of a prima facie case

If court does not find a prima facie case, you can explain the challenge for the record if you so choose

Protect the record. Racial makeup will not be evident on appeal. Save notes to file in the event of a later evidentiary hearing (on collateral attack)

Be prepared to address comparisons among challenged & non-challenged jurors